SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-997

UNITED STATES OF AMERICA

Respondent,

—VS.—

JOSEPH P. CANDELLA, JOHN KEVIN GILGAN and BEACON MOVING AND STORAGE, INC.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1973

No. .....

UNITED STATES OF AMERICA

Respondent,

—vs.—

JOSEPH P. CANDELLA, JOHN KEVIN GILGAN and BEACON MOVING AND STORAGE, INC.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated November 26, 1973. The judgment of the United States Court of Appeals for the Second Circuit affirmed judgments of conviction of the United States District Court for the Southern District of New York entered after trial by jury in which petitioners were found guilty of violations of Title 18 U.S.C. §1001 and §2 (aiding and abetting).

Opinions Below

The opinion of the Court of Appeals (Appendix, *infra* 1a-12a) is unreported as of this date. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was made and entered on November 26, 1973 (Appendix, *infra*, 13a-14a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The questions presented for determination are:

(a) Whether the determination of the Court of Appeals upholding venue jurisdiction over four counts of the eight count indictment violates the rights guaranteed petitioners by Article III, §2, clause 3 and the Sixth Amendment of the Constitution of the United States.

(b) Whether the admittedly erroneous charge to the jury with respect to the characterization of petitioners' defense by the District Court deprived petitioners of a fair and impartial trial.

Statutes Involved

18 U.S.C. §2:

> Principals: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

18 U.S.C. §1001

Statement of Entries Generally: Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. §3237(a)

Offenses Begun in One District and Completed in Another: (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

Any offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and except as otherwise expressly provided by enactment of Congress may be inquired of and prosecuted in any district from, through or into which such commerce or mail matter moves.

28 U.S.C. §1254(1)

Court of Appeals—Certiorari—Appeal—Certified Questions: Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after the rendition of judgment or decree.

United States Constitution,

Article III, §2, clause 3

Trial by Jury: The trial of all Crimes except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution

Sixth Amendment

Rights of the Accused: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement of the Case

Beacon Moving and Storage, Inc. is engaged in the moving and storage business. Joseph P. Candella and John Kevin Gilgan are its principal officers. Reference herein to Beacon shall include both the corporation and its principal officers. As part of its business, Beacon moves com-

mercial tenants whose property has been condemned for public use by various governmental agencies and subdivisions. As a result of such involuntary moves, the displaced commercial tenants are usually entitled to reimbursement for, among other things, their moving expenses.

In 1971, Beacon was retained to move four commercial tenants whose property had been condemned for public use by the City of New York. Pursuant to applicable state and federal law, each commercial tenant sought reimbursement for moving expenses from the City of New York which, in turn, sought reimbursement from the United States Department of Housing and Urban Development.

In support of their respective claims for reimbursement, the commercial tenants submitted certain documentation to the City of New York Department of Relocation and Management Services which administered the federally funded program. Included in the documentation were daily bills of lading prepared by Beacon showing the number of men and hours worked on a given day and an affidavit in which Beacon attested to the validity of its bills.

The indictment in this case charged that in each of the four moves in question the bills of lading of Beacon contained false statements in violation of Title 18 U.S.C. §1001 in that they stated a greater number of men and hours worked than was so. The indictment further charged that the affidavits which attested to the validity of the bills of lading were similarly false.

After an eight day trial before Honorable Dudley Bonsal, U.S.D.J., Southern District of New York, Beacon was found guilty as charged on all eight counts of the indictment. On November 26, 1973, the United States Court of Appeals for the Second Circuit affirmed the judgments of conviction.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals for the Second Circuit decided an important constitutional issue which should be settled by the Supreme Court of the United States. The decision of the Court of Appeals, in effect, upheld venue jurisdiction in a district divorced from that in which any criminal activity may have occurred, thus violating Beacon's constitutional right to trial in the state and district in which a crime was committed. In addition, the opinion tends to conflict with the principles enunciated by the Court of Appeals for the District of Columbia in *Byas* v. *United States,* 182 F. 2d 94 (C.A.D.C. 1950) concerning the trial court's erroneous charge to the jury vis-a-vis Beacon's right to a fair and impartial trial.

In the case at bar, Beacon filed certain documents in connection with two moving jobs encompassing four of the eight counts of the indictment with a site office of the New York City Department of Relocation and Management Services in Brooklyn, New York, which lies within the Eastern District of New York. Both moving jobs began and concluded in the Eastern District and never physically touched the Southern District of New York in which Beacon was indicted, tried and convicted.

In its opinion, the Second Circuit stated that pursuant to 18 U.S.C. §3237(a), an offense covering multiple districts, i.e., begun in one district and continued or completed in another, may be prosecuted in any district in which the offense was begun, continued or completed. The court concluded that proper venue lies in "the whole area through which force propelled by an offender operates". *United States* v. *Johnson,* 323 U.S. 273.

The court concluded, relying on *United States* v. *Kenofskey*, 243 U.S. 440 (1917), that the alleged false statements continued to be false and continued within the jurisdiction of the United States upon arrival in Manhattan where the decision to make funds available was reached.

We do not believe that *Kenofskey* governs the issue presented herein. There, a local agent of a life insurance company was charged with a scheme to defraud by use of the mails. He falsely represented to the insurance company that he had received a valid and genuine claim that a policy holder had died. He knew that the claim required approval of the main office and would be transmitted through the United States mail. The claim was subsequently mailed. The sole issue presented in the *Kenofskey* case was whether or not the agent's conduct violated the mail fraud statute which provided penalties for a device or artifice to defraud by placing in the mail, or causing to be placed in the mail, any letter, package or writing which would forward such plan. The issue was whether Kenofskey's act ended in the local office where he handed the false claim to his superior or whether the act continued through the mail so as to violate the statute. It was held that the agent actually caused the mailing and had thus violated the statute.

The case did not consider venue but merely whether Kenofskey's acts violated the federal statute.

The present case presents vastly different facts. There was no charge of a violation of the mail fraud statute; merely the violation of making a false statement. The essential question presented is solely a determination of where the false statement was made by Beacon. There is no dispute that the locus of all aspects of the two moving jobs in question, including the preparation, execution and

delivery of documents, occurred solely within Kings County in the Eastern District.

Here, we are concerned solely with the making of false statements, not the use of the mails as in Kenofskey.

The principles upon which proper venue is to be determined were stated by Mr. Justice Douglas in *Travis* v. *United States,* 364 U.S. 631 (1961), wherein he stated:

> "Where Congress is not explicit, the locus delecti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." 364 U.S. 631, 635.

We submit that applying the standard enunciated by Mr. Justice Douglas in *Travis* and Article III, §2, Clause 3 and the Sixth Amendment of the Constitution of the United States, it cannot be seriously argued that the crime of which Beacon stands convicted was begun, continued or completed in the meaning of 18 U.S.C. §3237(a) in any district other than the Eastern District of New York. We submit that all acts of the alleged crime were perpetrated in the Eastern District and that the Court of Appeals for the Second Circuit erred in affirming the conviction on the four counts of the indictment relating to the two moving jobs in question.

Concerning the propriety of a portion of the District Court's charge to the jury, it is admitted by all concerned, including the Second Circuit, that the charge was erroneous with respect to Beacon's position as to their bills of lading. The effect of the District Court's error was to tell the jury that Beacon was contending that its bills of lading were prepared in precisely the same manner as the government claimed. Thus, the jury was told, in effect, that on this point at least Beacon admitted guilt. After repeated objection of defense counsel, the District Court supplemented

its instruction on the point but it failed to expressly withdraw its earlier, erroneous charge or state its supplemental charge in such precise language as to inform the jury that the earlier charge was not controlling.

It is appellants' contention that the confusion created by this sequence of events so tainted the trial and confused the minds of the jurors so as to preclude Beacon from obtaining a fair and impartial trial.

In its opinion, the Court of Appeals for the Second Circuit dismissed the arguments proffered by Beacon, stating:

> "We cannot agree that reversal is required on these facts. In addition to the corrective charge, the original erroneous charge was not one of law but of fact . . .".

We do not agree that this distinction negates in any way the prejudice and confusion occasioned by the admittedly erroneous charge of the District Court. There is no way of knowing how the error affected the jury in its deliberations. Yet, we submit, a substantial chance exists that the deliberations were tainted by error. We find no support in the case law for the distinction made by the Second Circuit.

Rather, we respectfully submit that any material error in a charge to the jury, be it legal or factual, may merit reversal. The standards of fairness upon which we believe the present situation depends was set forth in *Byas* v. *United States* (C.A.D.C.), 182 F.2d 94, where the court stated:

> ". . . Thus, where two inconsistent instructions are given, the effect of one or the other, depending on where the error lies, must be removed from their minds before they can be allowed to retire to deliberate." (p. 98)

It is in this most fundamentally crucial aspect of the trial that the District Court erred. We respectfully submit that the deliberations of the jury were thus so tainted as to mandate the reversal of the judgments of conviction.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARVEY TROPP
Counsel for Petitioners

JOEL R. SCHWEIDEL

GORDON & TROPP

Of Counsel

Opinion of the Court of Appeals
(Decided November 26, 1973)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 195—September Term, 1973.

(Argued October 11, 1973 Decided November 26, 1973.)

Docket No. 73-1894

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH P. CANDELLA, JOHN KEVIN GILGAN and BEACON MOVING AND STORAGE, INC.,

Defendants-Appellants.

Before:

FRIENDLY, ANDERSON and MULLIGAN,

Circuit Judges.

Appeals from judgments of conviction entered after trial by jury in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge.* Appellants were found guilty on eight counts of a ten-count indictment charging the making of false statements in matters within the jurisdiction of the United States Department of Housing and Urban Development, in violation of 18 U.S.C. §§ 1001 and 2.

Affirmed.

HOWARD WILSON, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, John W. Nields, Jr., Assistant United States Attorney, of Counsel), *for Appellee.*

HARVEY TROPP, New York, New York (Gordon & Tropp, New York, New York, Joel R. Schweidel, of Counsel), *for Defendants-Appellants.*

MULLIGAN, *Circuit Judge:*

Joseph P. Candella and John Kevin Gilgan were the principal officers and the sole owners of Beacon Moving and Storage, Inc., a Brooklyn-based moving company. In 1971, Beacon undertook to move the property of four commercial tenants, Lapchinsky Iron Works, Chelsea Desk Co., Precision Container Co. and G.A.L. Manufacturing Co., each of which had been forced to move from Manhattan and Brooklyn sites because of federally funded urban renewal projects. Their property had been condemned by the City of New York and each was entitled to reimbursement from the City for its moving expenses.

The tenants, who had the initial obligation of paying the mover for his services, assigned their claims for reimbursement from the City to the mover, as permitted by the United States Department of Housing and Urban Development (HUD) regulation (24 C.F.R. § 41.12). The City then had the responsibility to process and pay the claims made by the movers. The City, in turn, was entitled to reimbursement by HUD. The City agency in charge, the Department of Relocation, based its payments on bills submitted by the moving company which were accompanied by so-called "bills of lading," which detailed the number of man-hours worked on each day by the

employees of the mover, plus an affidavit by the mover which attested to the accuracy of the bills of lading. The affidavits relating to the moves involved herein were executed on forms prepared by the City and not by HUD. The convictions appealed from were based on indictments charging that the bills of lading and affidavits submitted by the defendants for the four moves in question were false, in violation of 18 U.S.C. § 1001[1] and 18 U.S.C. § 2 (aiding and abetting).

Counts 1, 2, 3 and 5 related to false affidavits, and counts 6, 7, 8 and 10 charged that the bills of lading submitted exaggerated the amount of work performed. (Counts 4 and 9, which related to a fifth moving operation, were dismissed for jurisdictional reasons before trial with Government consent.) The jury trial was conducted before Hon. Dudley B. Bonsal, United States District Judge, Southern District of New York. The three defendants were found guilty on all eight counts on February 16, 1973, and judgments were entered on April 3, 1973. Judge Bonsal sentenced Candella and Gilgan to concurrent prison terms of 60 days on each of the eight counts and fines of $1000 on each count. The corporate defendant Beacon was fined $2000 on each of the eight counts. This appeal followed.

I. Jurisdiction

Appellants first claim that counts 1, 2, 3 and 5 of the indictment, which charged that the "Affidavits by Moving

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1 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Company for Moving Expenses" with respect to the four moves in question were false, should have been dismissed on defendants' pre-trial motion for lack of jurisdiction of the subject matter. Appellants' argument is based on the contention that the affidavits in question were not within the jurisdiction of HUD because they were not forms required by HUD, and were not only gratuitous but improper. Since the statute involved in this case prohibits the making of any false statements in any matter within the jurisdiction of a federal agency, the counts based upon the affidavits must fall if the affidavits were not in a matter within the jurisdiction of HUD.

The applicable HUD regulation is as follows:

> (a) *Form of claim.* To obtain a relocation payment, site occupants shall file written claims with the agency on the appropriate HUD forms.
>
> (b) *Documentation in support of a claim.* A claim shall be supported by the following:
>
> (1) If for moving expenses, except in the case of a fixed payment, a receipted bill or other evidence of such expenses. By prearrangement between the agency, the site occupant, and the mover, evidenced in writing, the claimant or the mover may present an unpaid moving bill to the agency, and the agency may pay the mover directly.
>
> (2) If for actual direct loss of property, written evidence thereof, which may include appraisals, certified prices, copies of bills of sale, receipts, canceled checks, copies of advertisements, offers to sell, auction records, and such other records as may be appropriate to support the claim.
>
> (3) In any other case, such documentation as may be required by the agency, which may include income

tax returns, withholding or information statements, and proof of age.

24 C.F.R. § 41.12.

This regulation is interpreted by appellants to preclude the use of the affidavit required by the City. They read § 41.12(b)(3) to mean that the City may require other documentation in its discretion only in cases not covered by subdivisions (1) and (2). While § 41.12(b)(1) requires that a claim for moving expenses be supported by a receipted bill (here the "bill of lading"), we cannot construe the regulation to hamstring the City so as to make the bill the sole and exclusive documentation to be submitted. The section in fact permits "other evidence of such expenses." While HUD may not have provided its own forms for reimbursement in cases not involving moving expenses or direct property losses, there is no language at all in the regulation which precludes the City from employing supplemental documentation in a moving expense situation. We read the regulation as only requiring the minimum; if further documentation was meant to be excluded the regulation could have easily so provided.[2]

The jurisdiction of HUD here is clear. The City entered contracts with the United States on specific urban renewal projects including those which prompted the moving here. The United States became ultimately responsible for pay-

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2 Under HUD regulations, the City shares a responsibility to pay a portion of the moving expenses of the tenant. Present regulations continue to provide for City involvement. 24 C.F.R. § 41.13. Due to procedural problems detailed in the affidavit of a HUD official appearing in the record before us, the Comptroller General ruled that HUD would pay for all of the moving expenses involved in the projects here in issue. Thus, the City is not a gratuitous intruder in the auditing process but has a definite stake in assuring that the bills submitted accurately reflect the cost of moving. With the widespread publicity attendant upon raids of the City treasury, the affidavit requirement here cannot be at all characterized as improper but is in fact commendable.

ing 100% of the moving expenses incurred by the four concerns involved. The interest of HUD in this matter was made abundantly clear to the appellants. They agreed to be paid by the City instead of the tenants. The affidavits they executed to obtain reimbursement from the City fully explained their purpose and HUD's involvement, reciting in part:

> [T]his affidavit is sent to the City of New York, knowing that the said City of New York, will rely thereon in making proper payment of Relocation payment for the moving of said Tenant by virtue of Section 114 of the Housing Act of 1949 as amended, and will make this affidavit available to the Department of Housing and Urban Development of the United States of America for the purpose of securing approval for full or partial reimbursement, and that any false statement will be a violation of the provisions of the United States Code subjecting the maker hereof to the penalties contained in the pertinent sections thereof.

It is thus clear beyond any doubt that the mover not only knew that the City would make the affidavits available to HUD for reimbursement purposes, but that any false statements contained therein would constitute violations of the United States Code subjecting him to criminal sanctions.

In arguing that the affidavits were not made in matters within the jurisdiction of any agency of the United States, appellants rely upon *Lowe* v. *United States,* 141 F.2d 1005 (5th Cir. 1944). In that case, an employee of a private shipbuilder made a false statement to his foreman as to the number of hours he had worked on a particular day. The company had an agreement with the United States Maritime Commission under which it was reimbursed for its payroll costs. The court held that the payroll department

of the shipyard company was not an agency of the United States, nor was it controlled or supervised by the federal agency. Hence, there was no offense against the United States. The fact pattern here was, of course, markedly different. Urban renewal is a joint enterprise of the City and the Federal Government. Each government cooperates in the funding of federally assisted projects. The City is responsible for administering federally funded projects, as well as those in which it provides the funding alone. The City's procedures for direct payment to movers are subject to explicit regulation, supervision and audit by HUD.

In distinguishing *Lowe,* the Eighth Circuit in *Ebeling* v. *United States,* 248 F.2d 429, 435, cert. denied, 355 U.S. 907 (1957) stated:

> We read the opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States; that the working time which he turned in thus necessarily would be a matter which was to be used against the government and as to which it accordingly had a right of audit and adjustment; and that in making the false statement with which he was charged, he had turned it in on this basis and with the intent that it was to be accepted and used in that relationship.

The case here is even stronger since the appellants were not only made aware of the nature and purpose of the affidavit, but were further advised that false statements would be violative of the United States Code.

Appellants also argue that counts 1 and 6 of the indictment involving the affidavit and bill of lading submitted by the appellants for the moving of the Lapchinsky Iron Works should have been dismissed since they involved a payment of only $3300. HUD regulations require that all claims for moving expenses in excess of $10,000 be approved by HUD. In the case of claims under $10,000, the City is authorized to make payment without securing express approval from HUD, although the complete file on such claims must be kept available by the City for audit and inspection by HUD. The affidavits and bills presented in connection with the Lapchinsky move thus were not turned over to HUD. Because of this, appellants argue that counts 1 and 6 cannot be said to concern "matters within the jurisdiction" of HUD. Case law makes it clear, however, that a violation of § 1001 does not require that the false statement must actually have been submitted to a department or agency of the United States, but rather that it was contemplated that the statement was to be utilized in a matter which was within the jurisdiction of such department or agency. See *United States* v. *Kraude*, 467 F.2d 37, 38 (9th Cir.), cert. denied, 409 U.S. 1076 (1972); *United States* v. *Greenberg*, 268 F.2d 120, 122 (2d Cir. 1959); *United States* v. *Ebeling, supra*, 248 F.2d at 434; *United States* v. *Myers*, 131 F. Supp. 525, 529-30 (N.D. Cal. 1955).

II. Venue

The appellants argue that venue was improperly laid in the Southern District of New York with respect to counts 1, 3, 6 and 8, which involved the affidavits and bills of lading of Lapchinsky and Precision, both Brooklyn-based companies which were being moved from Brooklyn locations. The argument is that since the allegedly false statements were prepared, executed and handed to New York City of-

ficials in Brooklyn, the crime was committed there, and the venue is therefore proper only in the Eastern District of New York, which embraces Brooklyn. While the question of whether the trial is conducted almost literally at one end of the Brooklyn Bridge or the other might seem to be a quibble, questions of venue in criminal cases are of constitutional concern. *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). Venue must be laid where the crime was committed, and that place is to be "determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). The Government argues that venue properly lies in the Southern District because the affidavits and bills of lading in question were simply accepted at the City's branch offices in Brooklyn for the convenience of parties seeking to file papers with the Department of Relocation and were then conveyed to the central office in Manhattan for examination and payment. The Lapchinsky documents remained in the City's Manhattan office for subsequent audit by HUD in New York. The Precision documents, involving expenses in excess of $10,000, were sent to the HUD office in Manhattan, where the City's initial decision to make payment was approved. The appellants cite no authority for their position but seem to rely on the theory that since enough had been done to constitute a crime in the Eastern District, the crime therefore terminated.

However, under 18 U.S.C. § 3237(a), an offense begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which such offense was "begun, continued, or completed." Although enough was done in the Eastern District to constitute a crime there, as appellants admit (cf. *United States* v. *Ruehrup*, 333 F.2d 641 (7th Cir.), cert. denied, 379 U.S. 903 (1964)), it does not follow that the crime then termi-

nated, and that what transpired in Manhattan was irrelevant for venue purposes. See *United States* v. *Miller*, 246 F.2d 486 (2d Cir.), cert. denied, 355 U.S. 905 (1957); *De Rosier* v. *United States*, 218 F.2d 420 (5th Cir.), cert. denied, 349 U.S. 921 (1955). Appellants seek to distinguish *Miller* and *De Rosier* because the City and not the defendants (as in those cases) forwarded the offending documents to Manhattan. The City's accepting the papers in Brooklyn, however, no more confined the offense to Brooklyn than the Post Office Department's acceptance of the documents in *Miller* and *De Rosier* confined the offense in those cases to the district in which the mailbox was located.

We think that venue is properly laid in "the whole area through which force propelled by an offender operates." *United States* v. *Johnson, supra*, 323 U.S. at 275. The force propelled here by the defendants immediately contemplated Manhattan. 18 U.S.C. § 1001 defines the offense as the making of a false or fraudulent statement or representation in a matter within the jurisdiction of a federal agency. The false statements here were intended to produce funds. The statements continued to be false and continued to be within the jurisdiction of the United States not only when initially presented but also upon arrival in Manhattan, where the decision was reached to make the funds available. See *United States* v. *Kenofskey*, 243 U.S. 440 (1917). Venue for all counts thus was properly laid in the Southern District of New York.

III. Evidence

The appellants urge that the court below erred in not directing a verdict of acquittal on the ground that the Government had not established that the bills of lading were false. The Government sought to establish falsity by comparing the man-hours for each moving job claimed on the

bills of lading with the corporation's own payroll books. The appellants argue that their payroll books were grossly inaccurate or that even if they were accurate, the Government arbitrarily deleted men and hours found in the payroll book from its computations. We are of course bound to view the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Tutino*, 269 F.2d 488, 490 (2d Cir. 1959). There is ample evidence from which the jury could infer that the bills of lading were knowingly false and fraudulent. The claims of appellants were fully presented to the jury below, and we cannot substitute our view for that of the jurors who heard the evidence and observed the witnesses.

IV. Charge to the Jury

The trial court erroneously charged the jury with respect to the defendants' position as to the bills of lading. While Judge Bonsal did say that the defendants denied their falsity, he further added: "As I understand it, they contend here really that they were doing the best they could and that they thought that they should come out with something that was approximating at least the estimate, the City's estimate of the cost of the job." However, after objection to this characterization of the position of the defense was made, the trial judge corrected his statement and said: "Then, from the defense side, the defendants are contending here that the hours they did expend on these jobs did total the hours that were in the bills of lading, and I will tell you that that is what the defendants are so contending." Appellants argue that the judgment below should be reversed because the erroneous charge was never expressly retracted by the trial judge but was merely supplemented.

We cannot agree that reversal is required on these facts. In addition to the corrective charge, the orignal erroneous

charge was not one of law but of fact, and it had been preceded by the statement:

> It may help you in your own recollection if I review what I understand to be the contentions here. But this again is a matter for your recollection. I am doing it only perhaps to help you with your recollection.[3]

In light of the prior admonition and the subsequent correction, we cannot find the error so prejudicial as to require a new trial. As the appellants admit, the testimony of defendant Candella that the bills of lading were in fact accurate made the position of the appellants abundantly clear. It is equally clear that the jury did not accept it.

Affirmed.

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3 Cases involving erroneous charges of applicable principles of law are not apposite, since the jury is bound by the law enunciated by the judge. Where, as here, the misstatement is one of facts, the jurors' own recollections of the facts as testified to are controlling and, as we have indicated, they were so advised by the court.

Judgment of the United States Court of Appeals for the Second Circuit (Filed November 26, 1973)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-three.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

73-1894

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH CANDELLA, JOHN KEVIN GILGAN,
BEACON MOVING AND STORAGE, INC.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

United States Court of Appeals
Second Circuit
Filed, November 26, 1973
A. Daniel Fusaro, *Clerk*

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No. 73-997

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH P. CANDELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1973

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JOSEPH P. CANDELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 16, 1973, after a jury trial in the United States District Court for the Southern District of New York, petitioners were found guilty on eight counts of a ten-count indictment charging the submission of false bills of lading and affidavits, in violation of 18 U.S.C. 1001 and 2 (aiding and abetting). Petitioners Candella and Gilgan were sentenced to sixty days imprisonment on each of the eight counts, to be served concurrently, and were fined $1,000 on each of the eight counts. The court of appeals affirmed (Pet. App. A).

Petitioners claim (1) that with respect to four counts venue was improperly laid in the Southern District of New York as opposed to the Eastern District of New York, and (2) that the trial court's erroneous characterization of their position as to the bills of lading re-

quires reversal. These assertions are fully answered in the opinion of the court of appeals (Pet. App. 8a-12a), upon which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.